The style is clear and flowing, drawing illustrations from the sources to which the author's scholarship gave him access. It is in striking contrast with Marshall's intensely focussed style; but it is none the less clear, and it has a richness which Marshall's lacks. The books have laid the foundations of an international reputation; and it was owing to them that Lord Campbell in the House of Lords in 1847 spoke of Story as "greater than any law writer of which England could boast, or which she could bring forward since the days of Blackstone."

RECENT CASES.

BILLS AND NOTES — ALTERATION — ESTOPPEL BY NEGLIGENCE. — H desiring to borrow money through her agent, signed a note for $500, written with a lead pencil. The agent raised the note to $1,200, and sold it for that amount to plaintiff, a *bona fide* purchaser. *Held*, that H is liable for $500 only. *Walsh* v. *Hunt*, 52 Pac. Rep. 115 (Cal., Sup. Ct.).

This case must be added to the increasing line of cases *contra* to the doctrine of *Young* v. *Grote*, 4 Bing. 253, that one who facilitates, by careless execution, the alteration of a negotiable instrument is liable to an innocent purchaser for the amount of the instrument in its altered form. This doctrine, which rests upon estoppel by negligence, appears to be the better view, and more consistent with the conception of a negotiable instrument. These instruments are intended to pass freely from hand to hand, and the principal case tends to interfere with their free circulation. See 10 HARV. LAW REV. 185.

BILLS AND NOTES — CONDITIONAL DELIVERY. — The maker of a note delivered it to the payee's agent on condition that it was not to take effect until signed by X, but the latter's signature was never obtained. *Held*, that these facts cannot be set up in defence in an action by the payee against the maker. *Hurt* v. *Ford*, 44 S. W. Rep. 228 (Mo.).

There is an almost hopeless conflict of authority as to whether there can be a conditional delivery of a note to the payee or his agent. Some courts have followed the strict rule as to deeds, that delivery in escrow can be made only to a stranger, while others have reached the same result by applying the parol evidence rule. *Stewart* v *Anderson*, 59 Ind. 375; *Mossman* v. *Holscher*, 49 Mo. 87. In England and in most of the jurisdictions in this country in which the question has arisen the courts have consistently applied to negotiable instruments the doctrine of *Pym* v. *Campbell*, 6 E. & B. 370, that the parol evidence in such a case does not tend to vary an existing written contract, but shows that no contract ever existed unless the contingency occurred upon which it was to take effect, and that therefore the parol evidence rule has no application. The old rule as to deeds is technical and should not be extended. *Merchants, etc. Bank* v. *Luckow*, 37 Minn. 542; *Alexander* v. *Walker*, 11 Lea, 221; *Burke* v. *Dulaney*, 153 U. S. 228. Of course if the note has come into the hands of a *bona fide* purchaser, the maker should be estopped to deny a valid delivery to the payee.

BILLS AND NOTES — CHECKS — REFUSAL OF PAYMENT. — A check was drawn on a bank where there were not sufficient funds to meet it. The drawer ordered payment stopped, but later increased his deposit above the amount of the check. *Held*, that the bank is liable to the holder for a subsequent refusal to honor although the order of the drawer had not been countermanded. A bank upon receipt of a deposit agrees "with the whole world" to honor presented checks if there are sufficient funds, and a secret understanding with the depositor is no defence to the holder's rights. *Gage Hotel Co.* v. *Union Nat. Bank*, 49 N. E. Rep. 420 (Ill.).

The Illinois cases have affirmed the right of a check-holder to compel payment by a bank on two grounds: first, that a check is an assignment *pro tanto* of the deposit; see 11 HARV. LAW REV. 548 for an adverse criticism of a late Illinois case taking this view; second, the ground of "implied contract" taken in the principal case. A check is an assignment when drawn, if at all. Since at that time there were not sufficient funds to meet it, the principal case, if sound, must be rested on the theory of "implied con-

tract." The phrase seems to be used in the sense of an obligation imposed by law to pay checks when presented, — a quasi-contractual rather than a contractual obligation. This must be imposed because such is the general custom and understanding of the commercial community, and upon this the Illinois court rests its decisions. It is believed, however, that the commercial understanding is that banks are under a duty to no one but the drawer to pay checks, and to him solely by virtue of the contract of deposit; and certainly that there is no other legal obligation where, as in the principal case, payment is ordered stopped by the drawer. On the general question the authorities are about evenly divided. See 2 Morse, Banks, § 490 *et seq.*

CARRIERS — WRONG TICKET — EJECTION. — Plaintiff requested and paid for a ticket to A. The ticket agent through mistake gave her a ticket to B, which she presented to the conductor with proper explanations. She was ejected for not paying fare to A. *Held*, that the company is liable. *Ala. & Vicksburg Ry. Co.* v. *Holmes*, 23 So. Rep. 187 (Miss.).

The case follows an earlier decision in the same State, *K. S., M. & B. R. R. Co.* v. *Riley*, 68 Miss. 765, which is put upon the ground that any regulation of the carrier requiring the conductor to eject a passenger under the above circumstances is unreasonable. This is contrary to the great weight of authority and seems unsound. *Bradshaw* v. *So. Boston R. R. Co.*, 135 Mass. 407. It is generally held that as between passenger and conductor the face of the ticket is conclusive evidence of the passenger's right to carriage. *Frederick* v. *M. H. & O. R. R. Co.*, 37 Mich. 342. This rule is frequently rested upon the practical reason that a proper regard for the convenience of passengers and the security of the company in collecting fares makes it impracticable for the conductor to regard other evidence of the passenger's right to carriage than his ticket. But there seems to be a more substantial ground on which to support these cases. The ticket is itself the only contract of carriage, and the passenger cannot complain because he is not carried to some other destination than that specified in his contract. 9 HARV. LAW REV. 353.

CONSTITUTIONAL LAW — ADDITIONAL SERVITUDE — ELECTRIC RAILROADS. — *Held*, that the construction of an electric railroad, with poles and overhead wires, imposes an additional servitude, not consistent with the purposes for which a street is dedicated. *Jaynes* v. *Omaha Street Railway Co*, 74 N. W. Rep. 67 (Neb.).

There is much conflict on the question of what uses may properly be considered to be within the original dedication of a highway to the public. Some courts have held that nothing is granted but the bare right of passage over the surface; *Western Union Tel. Co.* v. *Williams*, 86 Va. 696; others, that there is a general right of inter-communication. *Pierce* v. *Drew*, 136 Mass. 75. As to modes of conveyance over the surface, the true view seems to be, that it makes no difference what the motive power is, nor whether acquired from above or below, so long as the road is fairly and substantially usable as a highway. *Taggart* v. *Newport Street Ry. Co.*, 16 R. I. 668; *Halsey* v. *Rapid Transit Street Ry. Co.*, 47 N. J. Eq. 380. In the principal case, while the court seems to agree with this test, it finds as a matter of fact that a trolley road interferes with the substantial use of the highway.

CONSTITUTIONAL LAW — FOURTEENTH AMENDMENT — EIGHT-HOUR LAWS. — *Held*, that a State statute forbidding the employment of workingmen for more than eight hours per day in mines and smelting-works is a valid police regulation for the protection of health, and not a violation of the Fourteenth Amendment. *Holden* v. *Hardy*, 18 Sup. Ct. Rep. 383.

It was argued that there was a deprivation of property without due process of law and a denial of the equal protection of the laws in that the contracting power of a certain class of employers and laborers was limited by the statute. The decision in effect reaffirms the conservative construction of the term "property" which has been customary in the decisions of the Supreme Court. The case, therefore, is important in view of the tendency in some State courts to construe the terms "liberty" and "property" very broadly, and under cover of these terms to deny the validity of paternal legislation. *Commonwealth* v. *Perry*, 155 Mass. 117; *Braceville Coal Co.* v. *The People*, 147 Ill. 66; *State* v. *Loomis*, 115 Mo. 307. Paternalism is often very objectionable, but it is clearly a matter of policy. The opinion in the principal case also shows clearly that legislation is a progressive science, which can be satisfactorily developed only with the aid of experiments. It is not the province of the courts under our constitutions to stand in the way of these experiments. For an admirable discussion of this subject, see the dissenting opinion of Barclay, J., in *State* v. *Loomis*, *supra*.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — EVIDENCE. — A statute of Virginia provides that a common carrier accepting goods for transportation to a point

beyond its terminus assumes an obligation for their safe carriage to that point unless otherwise provided by a written contract signed by the shipper. (Code Va. [1887], §1295.) *Held*, that this statute as applied to interstate commerce is not void under the Federal Constitution, but is merely a rule of evidence. *Richmond & A. R. Co.* v. *R. A. Patterson Tobacco Co.*, 18 Sup. Ct. Rep. 335. See NOTES.

CONSTITUTIONAL LAW — TAXATION — FOREIGN-HELD MORTGAGES. — In Oregon, where the legal title to land mortgaged does not pass to the mortgagee, a statute provided that the interest of the mortgagee be taxed, and that the amount so taxed be deducted from the assessment of the mortgagor. *Held*, that the statute is constitutional. *Savings & Loan Soc.* v. *Multnomah County*, 18 Sup. Ct. Rep. 392.

The court relies squarely upon the ground that the lien of the mortgagee is an interest in the land and not a mere chose in action. A chose in action, such as the debt for which the mortgage is security, is taxable only at the domicile of the creditor. *State Tax on Foreign Held Bonds*, 15 Wall. 300. But an interest in land is taxable wherever the land is situated. The principal case is important in limiting the broad doctrine laid down by Field, J., in *State Tax on Foreign Held Bonds, supra.*

CONTRACTS — ANTICIPATORY BREACH. — *Held*, that where one party to a contract gives notice of his intention not to carry out his contract, the other party may treat this as an anticipatory breach, and sue for damages before the time for performance arrives. *Horst* v. *Roehm*, 84 Fed. Rep. 565 (Pa., Cir. Ct.).

The case follows *Hochster* v. *De La Tour*, 2 E. & B. 678, and is interesting from the fact that the question of anticipatory breach has seldom been adjudicated in this country. The only State which has adopted the English view is Iowa, while Massachusetts and Nebraska have refused to follow it. *McCormick* v. *Basal*, 46 Iowa, 236; *Daniels* v. *Newton*, 114 Mass. 530; *Carston* v. *McDonald*, 38 Neb. 857. In the United States Supreme Court the question was expressly left open. *Dingley* v. *Oler*, 117 U. S. 490. The criticism of the doctrine of anticipatory breach in *Daniels* v. *Newton*, *supra*, appears sound, but it is possible that in courts where the question has not yet been decided certain grounds of convenience may prevail over the objections on principle, and an action for breach of contract be allowed before the time for performance has arrived.

CONTRACTS — STRANGER TO THE CONSIDERATION. — Defendant made a contract with an employee to furnish him with medical attendance in case of accident. The employee was injured, and plaintiff, a physician, attended him. *Held*, that defendant is not liable to plaintiff for the services rendered. *Thomas Mfg. Co.* v. *Prather*, 44 S. W. Rep. 218 (Ark.).

The majority of American jurisdictions, including Arkansas, hold that a sole beneficiary of a contract, though a stranger to the consideration, may sue the promisor. *Chamblee* v. *McKenzie*, 31 Ark. 155. The principal case, however, refuses to allow the beneficiary to sue at law, when the contract looks to the satisfaction of a valuable claim which he has against the promisee. Public policy may demand that a sole beneficiary be given a remedy directly against the promisor, as otherwise he is without relief; but it is difficult to support an action at law on the principles of contract. In any event there is no such public policy in the principal case, and the decision therefore seems sound, although contrary to *Lawrence* v. *Fox*, 20 N. Y. 268, and the great weight of American authority. See 11 HARV. LAW REV. 415.

CRIMINAL LAW — DOCTRINE OF ESTOPPEL. — Defendant, a public officer, was indicted for embezzlement under a statute enacting that if any one charged with the receipt or safe-keeping of the money of the State convert any part of the same to his own use, he shall be guilty of embezzlement. Defendant collected some fees from insurance companies, which were by law made payable in advance into the State treasury, and converted them to his own use. *Held*, that defendant is not within the description of the statute, and is not estopped to deny that the fees were the money of the State. *Moore* v. *State*, 74 N. W. Rep. 319 (Neb.). See NOTES.

EQUITY — PRIORITY — ESTOPPEL. — The second of two equitable mortgagees took his mortgage, believing the property unincumbered. This belief was caused by the mortgagor's possession of the title deeds, which had been left in his hands by the prior mortgagee. *Held*, that the prior mortgagee is precluded from asserting priority. *In re Castell & Brown*, [1898] 1 Ch. 315.

Although as between two equitable claimants against the same person for the same thing the prior prevails, *Tyler* v. *Webb*, 6 Beav. 552, yet he may lose his advantage by his words or conduct. The possession of title deeds leads to a reasonable belief that the holder is the owner of unincumbered property. The second claimant acted on such a

belief. The prior claimant was therefore properly held to have estopped himself by reason of his negligence in not securing possession of the deeds. In accord with the principal case are numerous other decisions in England and in this country. *Farrand* v. *Yorkshire Banking Co.*, 40 Ch. D. 182; *Besson* v. *Eveland*, 26 N. J. Eq 468. Similarly, a legal mortgagee, by reason of his fraud or negligence, has been postponed to a subsequent equitable claimant. *Northern Counties, etc. Co.* v. *Whipp*, 26 Ch. D. 482.

EXECUTIONS — GARNISHMENT OF JUDGMENT DEBTS. — *Held*, that a judgment debt is subject to trustee process from the court in which the judgment was recovered. *Isabelle* v. *Le Blanc*, 39 Atl. Rep. 436 (N. H.).

Held, that a judgment debt is not subject to garnishee process from any other court. *Eisenberg* v. *Burchinell*, 52 Pac. Rep. 220 (Colo., Sup. Ct.).

These two cases together state and define the better doctrine as to garnishment of judgments, though there is authority *contra* to both. In some States it is held that a judgment debtor cannot be garnisheed in any event, because he would be unfairly burdened and exposed to double liability. *Black* v. *Black*, 32 N. J. Eq. 74. The force of this argument is very slight where the garnishee process is in the court which rendered the judgment, as the court can then easily protect the debtor, at least before execution has issued. The weight of American authority seems to be in favor of a more liberal view, and a few courts have gone so far as to make judgment debts subject to garnishment in any court. *Fithian* v. *R. R. Co.*, 31 Pa. St. 114. This is going too far, however, because, if the judgment and the garnishee process are in different courts, a conflict of jurisdiction arises, and the debtor can protect himself only by applying for an injunction against his creditor, or by similar expensive and troublesome proceedings.

NUISANCE — ABATEMENT. — A ditch draining the defendant's land filled up through natural causes and a pond formed on the premises. The water in this stagnated and became annoying and injurious to the neighborhood. *Held*, that this is not a nuisance in the legal sense, and the Justices of the Peace cannot order its abatement under Civil Code, § 4760. *Roberts* v. *Harrison*, 28 S. E. Rep. 995 (Ga.).

The court goes on the ground that a legal nuisance cannot result from natural causes alone, but that the act of man must have contributed to its existence. The very meagre authority on the subject in this country supports the present case. 1 Wood, Nuis., § 116; *Barring* v. *Com.*, 2 Duv. 95 (Ky.); *State* v. *Rankin*, 3 S. C. 438. The opposite view is suggested in 1 Bish., Cr. L., §§ 316, 828. This is upheld by the authority of an early English decision. *King* v. *Wharton*, 12 Mod. 510, and seems to be the correct view. It is the existence of the nuisance which is complained of as injurious to the public. To say that it shall be allowed to continue because it is the result of natural causes seems to give an inadequate reason either on the ground of principle or public policy.

PERSONS — INFANT'S CONTRACTS — RECOVERY OF CONSIDERATION. —The plaintiff, an infant, agreed to purchase a bicycle, and received it, and made partial payments thereon. She used it three months, and then returned it and demanded the money she had paid. *Held*, that she can recover the amounts so paid without diminution for the use of the bicycle or for any deterioration in value which was the ordinary result of such use. *Rice* v. *Butler*, 44 N. Y. Supp. 494 (Sup. Ct., App. Div.).

This decision does not seem to be distinguishable on principle from *Bartholomew* v. *Finnemore*, 17 Barb. 428. There an infant gave certain goods in exchange for a horse. He afterwards rescinded the contract, but it was held that he was entitled to recover the value of his goods only on returning the consideration received by him, and that a return of the horse in a depreciated condition was not a return of the consideration received. The principal case, however, places New York in accord with the few authorities in this country. *Whitcomb* v. *Joslyn*, 51 Vt. 77; *McCarthy* v. *Henderson*, 138 Mass. 310. There is great conflict of authority as to whether an infant who rescinds a contract of purchase can recover the consideration paid without returning the goods purchased. His right to recovery, however, if he does return, seems settled. To allow recoupment for the use of the goods, or for deterioration not the result of the infant's tortious conduct, would subject him indirectly to a liability which could not be enforced directly on account of his infancy. *Stack* v. *Cavanaugh*, 30 Atl. Rep. 350.

PROPERTY — IMPLIED RESERVATION OF EASEMENTS. — A land-owner sold part of his estate without expressly reserving a way through the part disposed of. The part retained could be reached only by ocean or through the part sold. *Held*, that the access by sea will prevent the implied reservation of a way by land. *Hildreth* v. *Googins*, 39 Atl. Rep. 550 (Me.). See NOTES.

PROPERTY — EJECTMENT — MUNICIPAL CORPORATIONS. — *Held*, that a municipal corporation may maintain ejectment for the recovery of a street dedicated to public use by the owner of the fee. One judge dissenting. *City and County of San Francisco* v. *Grote*, 52 Pac. Rep. 127 (Cal., Sup. Ct.).

The better view, and the one supported by the weight of authority, is that taken in the dissenting opinion. Sedg. & Wait, Tr. Title to Land, Chap. VIII. The city had only an easement in the street, and an easement does not constitute an estate in lands. To allow the grantee of an easement to bring ejectment is a plain departure from the common-law rule which requires some corporeal estate to support that form of action. *Rowan* v. *Kelsey*, 18 Barb. 484. The majority of the court argued that the city gets such an interest as is necessary for the enjoyment of its rights in the street, and that this interest is sufficient to support the action. But it is equally true that a private easement carries with it such an interest in the land over which it extends as is essential to its proper enjoyment, and the grantee of a private easement has never been allowed to bring ejectment. It seems that the rights of the public may be fully protected by indictment, injunction, or an action for maintaining a nuisance.

PROPERTY — EXCHANGE OF LANDS. — Plaintiff conveyed certain land to defendant, and received in consideration therefor a deed from defendant of certain other land and $25 in money. The word "exchange" was not used in either conveyance. *Held*, that the transaction was not a technical common-law exchange, so as to contain an implied warranty of title by both parties. *Windsor* v. *Collinson*, 52 Pac. Rep. 26 (Ore.).

The case is interesting as a surviving bit of mediævalism, and as illustrating the fact that, even in these days of statutory alterations, a knowledge of Coke and Littleton may become of practical importance. All the authorities are agreed that the word *escambium*, or "exchange," is as necessary to this form of conveyance as the word "heirs" to the creation of a fee; and this alone was sufficient to decide the case. 2 Black. Com. 323. In the opinion of the court, the fact that money was paid by one party was equally fatal; and some cases in this country support that position. *Long* v. *Fuller*, 21 Wis. 122. The older authorities, however, make no mention of such a requirement; and this omission is, perhaps, significant. Sheppard's Touchstone, 294. The plaintiff was correct in his contention that an implied warranty was an incident of a technical exchange. Upon a failure of title to the land received, either party was entitled to re-enter on the land given by him in exchange. Sheppard's Touchstone, 290.

PROPERTY — RECORDING ACTS — CONSTRUCTIVE TRUST. — Plaintiff's agent, A having spent $1,000 intrusted to him by plaintiff to loan on mortgage security, had a friend execute a mortgage to plaintiff on certain land, to which in fact neither the friend nor A had any title. A fraudulently told plaintiff that the mortgage was a good lien on the land, and thereupon the latter accepted it and had it recorded. Later A bought the land himself and afterward assigned it for the benefit of his creditors. *Held*, that the assignee took the land free from any equity in plaintiff. *Robertson* v. *Rentz*, 74 N. W. Rep. 133 (Minn.).

By the laws of Minnesota a deed, mortgage, or an express trust is not good against an assignee in insolvency unless recorded, but an implied or resulting trust is. The reasoning of the court is as follows. The creditors would have no constructive notice of the mortgage from the record because it was made by a stranger to the title, and therefore it is to be taken as unrecorded. By estoppel against A it is to be considered as if actually made by him to plaintiff, but being unrecorded it is not good against the assignee in insolvency. The reasoning is specious but unsound. A by his false representations is estopped to deny that the mortgage is a valid lien on the land, but plaintiff's claim is certainly in the nature of a constructive trust, arising by implication of law from A's fraud. Plaintiff used due diligence by recording the mortgage as he understood it, and to punish him for not recording a claim arising out of a fraud of which he knew nothing, — a claim in its very nature unrecorded, — is to pervert the registry laws to a strange use.

PROPERTY — RULE IN SHELLEY'S CASE. — Testator devised lands to A for life, remainder to his heirs. *Held*, that the rule in *Shelley's Case* does not apply, and A takes only a life estate. *Wescott* v. *Benford*, 74 N. W. Rep. 18 (Iowa).

The court rests its decision on the ground that a strict application of the rule in *Shelley's Case* would defeat the intention of the testator as to the life estate to A. As was conclusively shown in *Van Grutten* v. *Foxwell*, [1897] A. C. 658, the rule in *Shelley's Case* is not a rule of construction, but an absolute rule of property. Its object, it may be said, is to defeat the intentions of the testator when they run counter to it. Rules of construction may be employed to discover what was meant by the word "heirs." If it means a particular class the rule does not apply. If it means heirs in a general sense, as it did in the principal case, the rule should be applied notwithstanding

the intention of the testator. The harshness of the rule, which influenced the decision in the principal case, while it may be a good reason for its abolition, furnishes no excuse for construing it into something which it is not. See 11 HARV. LAW REV. 418.

PROPERTY — SEPARATE USE — RESTRAINTS ON ALIENATION. — A woman in contemplation of marriage conveyed all her property to a trustee in trust for herself for life, for her separate use, without power of anticipation. After her marriage, she borrowed money from plaintiff, expressly charging her separate estate. *Held*, that the income is liable in the hands of the trustee for the satisfaction of plaintiff's claim. *Brown* v. *McGill*, 39 Atl. Rep. 613 (Md.). See NOTES.

QUASI CONTRACTS — QUANTUM MERUIT. — A statute provided that convicts should not be required to labor on certain holidays. The defendant, a lessee of convict labor, compelled the plaintiff, a convict, to work on the prescribed days. *Held*, that the plaintiff cannot recover in an action of contract the value of such labor. *Sloss Iron & Steel Co.* v. *Harvey*, 22 So. Rep. 994 (Ala.)

Apparently the court failed to recognize the distinction between a contract implied in fact and a duty to pay which the law will raise when one person is unjustly enriched at the expense of another. Such a duty may be enforced in a contractual form of action, and seems clearly to have arisen in the principal case. The court admit the plaintiff's right to damages in trespass. It appears that he should have been permitted to waive this right and to recover in contract the value of the benefit received by the defendant. *Patterson* v. *Prior*, 18 Ind. 440.

SALES — CONTRACT OF EXCHANGE — STATUTE OF FRAUDS. — On Saturday, the plaintiff and defendant verbally agreed to exchange horses. The defendant received the plaintiff's horse on Sunday, and the next day, repudiating the bargain, he returned him to the plaintiff. In an action of replevin, *held*, that the contract of exchange was within the Statute of Frauds, and that the statute was not satisfied by the receipt of the horse on Sunday. *Ash* v. *Aldrich*, 39 Atl Rep. 442 (N. H.).

Contracts of exchange are not contracts of sale, and, as an original question, it is very doubtful whether the former should be held to be within the Statute of Frauds. However, courts have so often assumed them to be, without discussion, that the principal case would probably be generally followed on this point. Browne, Statute of Frauds, 5th ed., § 293. The decision of the court upon the other point presented is open to some doubt. The New Hampshire statute declares that no contract shall be valid unless the statute has been complied with. In other jurisdictions, with similar statutes, it is the settled construction that the Statute of Frauds presupposes a completed legal contract, and the requirements of the statute must be fulfilled simply as a prerequisite of bringing an action. *Amsinck* v. *American Ins. Co.*, 129 Mass. 185; *Maddison* v. *Alderson*, 8 App. Cas. 467. Under such a construction, a verbal contract made on Sunday would be unenforceable, although the statute was satisfied on a weekday. It would seem to follow that the time of satisfying the statute is of no importance, and if the contract was not made on Sunday it should be enforced. Browne, Statute of Frauds, 5th ed., § 138 *b*.

SALES — ESTOPPEL — CONDITIONAL DELIVERY. — The plaintiff sold goods to D' part payment to be made in cash. The goods were shipped and delivered without the cash payment. The plaintiff knew D was a tradesman and would put the goods on sale. D sold to the defendant and the plaintiff replevied them, claiming title. *Held*, the plaintiff is estopped to deny that he parted with his title. *Lewenberg* v. *Hayes*, 39 Atl. Rep. 469 (Me.).

It was apparently the theory of the court that the plaintiff intended to retain title to the goods, since part payment was to be made in cash. Such a doctrine is often applied to small transactions. *Bussey* v. *Barnett*, 9 M. & W. 312. In commercial transactions, however, when goods are ordered to be shipped, the title presumably passes on shipment. *Long* v. *Fragano*, 4 B. & C. 219. In the principal case, the stipulation for cash payment would hardly show a different intention, but would merely indicate that the plaintiff retained a lien on the goods. His voluntary delivery to D would terminate that lien and D's title would become perfect. *Hoskins* v. *Warren*, 115 Mass. 515. Assuming, however, that D had no title, the defendant's right to the goods was unimpeachable, without invoking the doctrine of estoppel. The plaintiff, by intrusting his goods to one whom he knew would sell them, impliedly authorized a sale, and the defendant, being a *bona fide* purchaser, would acquire a good title. *Spooner* v. *Cummings*, 151 Mass. 313.

SALES — RESCISSION BY SELLER — TENDER OF PARTIAL PAYMENT. — The plaintiff, induced by fraud, sold goods to the defendant. The defendant made a payment on account and then sold part of the goods to a *bona fide* purchaser. *Held*, that the

plaintiff may replevy the goods still retained by the defendant without tendering back the money paid on account. *Forwell Co.* v. *Hilton*, 84 Fed. Rep. 293 (Wis. Sup. Ct.).

It is commonly said that a vendor, before he can rescind a contract of sale, must return anything of value which he has received from the vendee. Benjamin, Sales, 6th ed., 445. The court recognizes that such a proposition is true as a general rule, but refuses to apply it to the present case. The result is surely just. Since the rights of no third person are involved, the vendee should not be allowed to take any advantage of his own misconduct. To require a repayment of the money received on account, as a condition precedent to the right to rescind, would put a premium on fraud; it would be idle as well, since the vendor, if he rescinded and recovered a part only of the goods, could probably also sue and recover the price of the balance. *Powers* v. *Benedict*, 88 N. Y. 605; *Sleeper* v. *Davis*, 61 N. H. 61. The weight of authority is in accord with the principal case. *Sloane* v. *Shiffer*, 156 Pa. St. 59; *Sisson* v. *Hill*, 18 R. I. 212.

TORTS — CONVERSION — CHATTEL MORTGAGES. — A chattel mortgage gave the mortgagee power to take possession and sell on default or if he felt insecure. Defendant, a sheriff, served the summons in a foreclosure action and took possession against the protest of the mortgagor. *Held*, that the mortgagee could not take possession without the consent of the mortgagor, and that the sheriff is liable to the mortgagor for conversion. *McClellan* v. *Gaston*, 51 Pac. Rep. 1062 (Wash.).

In a similar case, the mortgagee was held liable for trespass when he took possession accompanied by an officer who had no legal process but who acted *colore officii*. *Thornton* v. *Cochran*, 51 Ala. 415. This decision has been supported on the ground that the taking was by threat or constructive force. Jones, Ch. Mort., 4th ed., § 705. A subsequent Alabama decision holds that such cases should be subject to the rules governing reception, and the former case seems doubtful. *Street* v. *Sinclair*, 71 Ala. 110. The present case would hold the sheriff liable even though he acted in a private capacity as agent of the mortgagee. The power granted in the mortgage to take possession gives the grantee a license which becomes irrevocable on default. *McNeal* v. *Emerson*, 81 Mass. 384. On default also the mortgagee gets an absolute title and a right to immediate possession. It seems then that the mere protest of the mortgagor should not make the taking of possession either a trespass or a conversion. *Landon* v. *Emmons*, 97 Mass. 37; Jones, Ch. Mort., 4th ed., §§ 434, 774.

TORTS — INN-KEEPER'S LIABILITY. — The defendant, a hotel-keeper, contracted with a club to furnish a banquet at his hotel. The club invited the plaintiffs, who took a room at the hotel for the night. While at the banquet their hats were lost from the hat-rack without negligence on the part of the defendant. *Held*, that the defendant is not liable for the loss. *Amey* v. *Winchester*, 39 Atl. Rep. 487 (N. H.).

The decision shows the tendency of the courts to limit the strict common-law liability of inn-keepers, and it seems to go farther in that direction than previous cases. It may be questioned whether it does not go too far. It is settled that the peculiar relation of inn-keeper and guest does not arise when the inn is visited for some special purpose, not connected with passage or travel. Such is the case when one goes on the invitation of the inn-keeper, or of a guest of the inn, or of some third party who has hired the inn. *Calye's Case*, 8 Coke, 32; *Carter* v. *Hobbs*, 12 Mich. 42; *Fitch* v. *Casler*, 17 Hun, 126. In the present case, however, the plaintiffs were guests of the inn by virtue of having taken a room there, but they were deprived of their rights as such, because, at the time of the loss, they were using the inn for a purpose not contemplated by the relation of inn-keeper and guest.

TORTS — JOINT TORT-FEASORS — TENDER. — The plaintiff had obtained a judgment against one of two joint tort-feasors, and had been tendered the amount of the judgment by him. *Held*, that this is a bar to an action against the other. *Berkley* v. *Wilson*, 39 Atl. Rep. 502 (Md.).

The English view in such a case is that judgment without satisfaction will prevent recovery. *Brown* v. *Wooton*, Cro. Jac. 73. In this country generally the opposite view prevails, unless the judgment be completely satisfied. 11 HARV. LAW REV. 556. In the principal case the court declines to decide this question, considering tender equivalent to satisfaction. If the American rule be correct, it is difficult to see how the plaintiff can be said to lose his right of action by refusing to accept payment, since it lay in his option to enforce the judgment or bring an action against the defendant. The defendant's wrong was not rendered less by reason of the tender. Even the plea of satisfaction is only effectual on the ground that double compensation will not be allowed, and not because the defendant's act becomes less tortious. Moreover, other courts have not considered a tender as satisfaction. *People* v. *Beebe*, 1 Barb. 379; *Lincoln Savings Bank* v. *Ewing*, 12 Lea, 598.

TORTS — MALICIOUS ABUSE OF PROCESS — SATISFACTION. — The defendant maliciously directed an officer to levy an attachment on the goods of the plaintiff, who was not his judgment debtor. The plaintiff replevied the goods from the officer, and in the replevin suit obtained a judgment against the officer for damages, which remain unpaid. *Held*, that the return of the goods is not a bar to this action against the defendant for malicious abuse of process. *Vincent* v. *McNamara*, 39 Atl. Rep. 444 (Conn.).

It is settled that an action for malicious abuse of legal process will lie where a wrongful attachment is levied. Recovery was therefore properly allowed for damages to the goods and business losses sustained by the plaintiff by reason of the attachment. *Zinn* v. *Rice*, 161 Mass. 571. The decision is correct also on another ground. The return of the goods alone was only partial satisfaction, and therefore, according to the weight of American authority, was not a bar to the present action against a joint tort-feasor. *Lovejoy* v. *Murray*, 3 Wall. 1. For this reason the result in the principal case seems preferable to that reached in *Karr* v. *Barstow*, 24 Ill. 580. The court there decided that a recovery in replevin with a return of the goods is a bar whether the damages awarded in the replevin suit be paid or not, because "the return is a satisfaction for the trespass."

TRUSTS — GIFT OF CHOSE IN ACTION — BOOK OF ACCOUNTS. — An intestate delivered to the plaintiff as a gift his book of accounts. In an action against the administrator to recover the proceeds of the accounts subsequently collected by him, *held*, that the plaintiff is entitled to recover. *Jones' Admr.* v. *Moore*, 44 S. W. Rep. 126 (Ky.).

It was held in *Ashbrook* v. *Ryan*, 2 Bush, 228, that a gift of an ordinary depositor's pass-book is not a valid gift of the deposit. A pass-book is generally regarded as not sufficiently resembling a specialty obligation to make its transfer a transfer of the debt. This reasoning seems to apply equally to an account-book. The principal case may be supported on the theory that the delivery of the book vested in the donee an implied power of attorney to collect the debt for his own benefit, which power was irrevocable because coupled with an interest, viz., legal title to the book. The term "legal interest," however has hitherto been restricted to something necessary to the collection of the debts; nor have the courts regarded these transactions as transfers of powers of attorney.

REVIEWS.

LAW AND POLITICS IN THE MIDDLE AGES. By Edward Jenks. New York: Henry Holt & Co. 1898. pp. xiii, 352.

This book is a valuable contribution to legal history. It is a lucid exposition of those ideas and institutions which have had an abiding influence upon law and government. In the first two chapters Austin's doctrine, that law is the arbitrary command of the State, is shown to be untrue as regards the Middle Ages. The *leges barbarorum* and the feudal custumals were more or less declaratory of existing usages. Changes or reforms were adopted in practice and then declared to be law. It is not until England produces the first national law of medieval Europe, after the establishment of Parliament by Edward I., that Austin's doctrine becomes approximately true. In succeeding chapters the writer traces the early history of the State and of the administration of justice; the origin of the village, the hundred, and the shire; and the inception of our ideas of property and contract. Chapter V. contains an admirable account of how the local districts in France and Germany became fiefs, while in England the Anglo-Norman kings converted the shires into State districts administered by royal officials, and thus succeeded in reconciling a strong monarchy with local government. Students of legal history will